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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-1592 (D)

DANIEL R. SMELSER,
Petitioner

v.

THE HONORABLE CHARLES KELLEY,
JUDGE OF THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The real party in interest, Lisa Smelser, the Defendant below, prays that the Petition for a Writ of Certiorari to the Supreme Court of Oklahoma be denied.

STATEMENT OF THE CASE

This case involves a question of jurisdiction to determine custody of a four-year old child, Phillip

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[1] The parties in the trial court below are Daniel R. Smelser, Plaintiff; and Lisa Smelser, Defendant. Charles Kelley was the judge in the Trial Court, the Oklahoma District Court of Oklahoma County, Oklahoma.

Daniel Smelser. Phillip's parents, Lisa and Daniel separated in December, 1982, when Lisa moved to Seattle, Washington with her son, Phillip. The Parents were divorced in Seattle, Washington, in May, 1984,[2] in which action the Court granted custody of the child to the mother. Both parties submitted to the jurisdiction of the Superior Court in Washington. In May, 1984, after the divorce, the mother moved to California with her son.

In October, 1984, the father filed a Motion to Modify Child Custody in Oklahoma, alleging an emergency.[3] Then, ostensibly for his regular fall visitation, the father traveled to California, signed an agreement that he would return the child to the mother in two weeks, and returned with the child to Oklahoma. After returning to Oklahoma, (where the child had not lived for over two years), the father had the mother served in California with the process which the father had filed before he left. The respondent mother made a special appearance in the Oklahoma action.[4]

After hearing evidence, the Honorable Judge Kelley ruled on November 16, 1984 that no emergency existed and declined to exercise jurisdiction over the matter.[5] Judge Kelley then called Judge Nichols in California (before whom the custody

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[2] *Smelser v. Smelser*, Case No. JFD 84-6458 (Oklahoma District Court, Oklahoma County, filed October 24, 1984, Petition, Exhibit "A").

[3] *Smelser v. Smelser*, Case No. JFD 84-6458 (Oklahoma District Court, Oklahoma County, filed October 24, 1984) [hereinafter, Trial Court.]

[4] Trial Court, Special Appearance and Motion to Quash.

[5] Trial Court, Journal Entry of November 16, 1984.

issue was then pending as well), and the two judges agreed that this case be transferred to Judge Nichols in California. The mother returned with her son to their home in California.

From the trial court's ruling, the Petitioner chose to take two simultaneous routes to the Oklahoma Supreme Court. First, he appealed the trial court's act of declining to exercise jurisdiction.[6] Second, he sought to have the Oklahoma Supreme Court assume original jurisdiction and issue a Writ of Mandamus in his favor.[7]

In seeking the Writ of Mandamus, the Petitioner contended that the trial judge concluded that the Oklahoma District Court should not have jurisdiction of this case. He further contended that a California Court cannot have *in personam* jurisdiction of the Petitioner for failure of minimum contracts.[8] In the separate appeal of the decision of the trial Court to the Oklahoma Supreme Court, Petitioner raised (*inter alia*) the issues of the abuse of discretion by the trial judge in declining jurisdiction and the lack of minimum contacts required for a California Court to exercise *in personam* jurisdiction over the Petitioner.[9]

Upon declination of original jurisdiction by the Oklahoma Supreme Court in *Smelser v. Kelley*, the

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[6] *Smelser v. Smelser*, #63500 (Okla. Supreme Ct., Filed December 14, 1984) [hereinafter Oklahoma Appeal.]

[7] *Smelser v. The Honorable Charles Kelley*, #63515 (Okla. Supreme Ct., filed December 17, 1984, denied by Order, January 29, 1985) [hereinafter Application for Writ of Mandamus.]

[8] Application for Writ of Mandamus, Petition, pp. 4-5.

[9] Oklahoma Appeal, Petition in Error, Exhibit "C".

Petitioner sought a writ of certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. *Neither the decision below nor the record raises the question presented in the Petition.*

The sole question presented in the Petition (p. i.) is whether "minimum contacts" are a prerequisite to the exercise of *in personam* jurisdiction by a State Court over an individual in a child custody modification proceeding. Petitioner's approach to this issue is novel. He asserts that the Oklahoma Court *has* minimum contacts and relies on alleged *lack* of contacts in the California forum. He does not make a collateral attack upon the Washington judgment for lack of *in personam* jurisdiction. On the contrary, he registered the Washington Divorce Decree in the trial Court. He does not appeal on the cause in which he is named Defendant in California and presents no record to show the California action's finality. In short, the argument he raises for the requirement of "minimum contacts" in an action to determine the custody of a child inure to the benefit of the mother and are precisely the reasons for which the Defendant below made her special appearance to question the jurisdiction over her person by the Oklahoma Trial Court.

2. *The record fails to show that the trial Court or the Oklahoma Supreme Court decided a matter of Federal law.*

Neither the decision of the Oklahoma State Supreme Court, nor the decision of Judge Kelley in the Oklahoma County District Court clarify whether the declination of jurisdiction was made upon constitutional grounds based in the fourteenth amend-

ment, or upon state law based on the Uniform Child Custody Jurisdiction Act as adopted by Oklahoma, Title 10, Oklahoma Statutes, Section 1601, et.seq. (Supp. 1980), [hereinafter referred to as the U.C.C.J.A.]

It is well settled that a child custody determination is an action which requires *in personam* jurisdiction over both of the parents as a matter of Federal law. *May v. Anderson*, 354 U.S. 528 (1953); *Kulko v. Superior Court of California*, 436 U.S. 84 (1978).

However, under the discretionary provisions of the U.C.C.J.A. the Oklahoma Courts have declined to exercise jurisdiction as a matter of State law. In *Holt v. District Court* 626 P.2d 1336 (1981), the Oklahoma Court adopted the two step approach to determine whether to exercise jurisdiction. This approach presents two questions: First, does the Court have jurisdiction under the Act, and second, if so, should that Court exercise its jurisdiction. 626 P.2d at 1341. The Court explained the Oklahoma version of the U.C.C.J.A. as follows:

> Our version of the U.C.C.J.A. contains four prerequisites for jurisdiction . . . They are alternative, and if the requirements of any one of the four are met an Oklahoma Court has jurisdiction. *Even if jurisdiction exists, however, it may not be proper for the Court to exercise its jurisdiction.* There are three grounds set out in the Act, one mandatory and two discretionary on which the Court must, or should decline to exercise jurisdiction . . . In addition, the jurisdiction of an Oklahoma Court to modify a custody decree rendered by the Court of another

state is substantially curtailed." 626 P.2d at 1341. (Emphasis added.)

One of the discretionary grounds for declining to exercise jurisdiction is "when the Petitioner has snatched the child, and improperly retained custody after visitation, or engaged in similar reprehensible conduct." (*Id.*) Because the case has been appealed, *Smelser v. Smelser*, No. 63500 (Okla. filed December 14, 1984), the State's Supreme Court may yet render a decision showing adequate state grounds to support the Trial Court's decision. Therefore, the Petitioner cannot, as required by the Rules of the Supreme Court of the United States, 21.1(h), show "the way in which [the Federal questions] were passed upon by the Court . . . " Nor would review be proper, if the decision is determined by the State Supreme Court to have been based upon adequate State grounds. *Murdock v. Memphis*, 87 U.S. (20 Wall), 590 (1875).

3. *The Petitioner has failed to establish that the Order appealed from is final and, therefore, fails to establish the jurisdiction of this Court.*

The Petitioner invokes the jurisdiction of this Court under the provision of 28 U.S.C. 1257(3). This jurisdictional grant by Congress requires both a "final judgment or decree" and a federal question. The Petitioner has presented neither in his Petition. By pursuing two routes of appeal, only one of which is completed, the Petitioner brings this matter before this Court while the matter is still pending before the State Supreme Court.

The general interpretation of this jurisdictional statute precludes review "where anything further remains to be determined by a State Court."

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). However, circumstances may exist in a "very few" cases in which the "highest court of a State has finally determined the Federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Although this Court now recognizes four categories described in *Cox Broadcasting* in which the decision will be treated as a final order on the Federal issue, "[i]n most, if not all, of the cases in these categories, the additional proceedings would not require the decision of other Federal questions that might also require review by the Court at a later date . . . " *Cox Broadcasting*, at 477. When the Petitioner himself seeks further review of the very issue raised there, in a state appellate proceeding, he should not be heard to say that the order in the intervening proceeding is final.

The case presented by the Petitioner meets none of the exceptions enumerated in *Cox Broadcasting*. The case does not meet the requirements of the first three categories. First, there is no final decision of a Federal question, as shown in reason two above.

Second, a decision of the federal question presented here will not render "the outcome of further proceedings preordained." *Cox Broadcasting* at 479. If the Petitioner prevails in showing that California does not have requisite minimum contacts over his person, the mother still has the full panoply of fourteenth amendment protection from the imposition of *in personam* jurisdiction in Oklahoma. If that hurdle is cleared, then the trial Court

will reach the merits of the case, the outcome of which is not "preordained."

Third, if jurisdiction is accepted by the Oklahoma Courts a broad range of issues, including the Federal question of whether full faith and credit should be given the Washington divorce decree, will be presented for later appellate review.

Nor will allowing the case to proceed in the normal appellate process of the State of Oklahoma preclude review of the Federal question. On the contrary, only by such proceeding will the record below reflect the basis of the decision of the trial Court.

The fourth category presented in *Cox Broadcasting*, 420 U.S. at 482-483, allows this Court to treat as final those decisions in which the State Court's decision on a Federal question might seriously erode a Federal Policy. In the issues presented by *Cox Broadcasting* this Court was able to clarify "an important question of freedom of the press under the First Amendment," *Cox Broadcasting*, at 486, removed the shadow under which the press was operating in Georgia, and most importantly brought the litigation to an end. *Id.* This Court has accepted cases for review when the Federal issue could be clarified and long and complex litigation avoided. See *Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241 (1974); and *National Socialists Party of America v. Village of Skokie*, 423 U.S. 43 (1977). This Court has refused to grant a Writ of Certiorari, when the case presented no final judgment and other Federal issues remain to be resolved. *Flint v. Ohio*, 451 U.S. 619 (1981). In the *Flint* case, delaying review of whether or not a publication is obscene until the Petitioner was convicted by the court below was

held not to seriously erode Federal policy within the meaning of prior cases. *Id.* at 622.

A ruling in this case in favor of the Petitioner would not end litigation in the Court below, nor does the Petitioner raise a compelling Federal Policy, which would be seriously eroded by this Court's decision to wait until the record below is in a proper posture for decision of the Federal question.

4. *The cloudy record below commands the exercise of judicial prudence by not granting the Writ of Certiorari.*

When a record is cloudy, even when important questions are raised, judicial policy may require that the Writ of Certiorari be denied, with the hope that different aspects of an issue be illumined by the Courts below. *Maryland v. Baltimore Radio Shows, Inc.*, 338 U.S. 912 (1950).

The record below is deficient in other respects on the issue of whether the trial Court had jurisdiction. The Petitioner argues that the Oklahoma Court cannot dismiss his action because the California Court cannot gain jurisdiction over his person. There have been no hearings held on the contacts which Petitioner has with California, nor would it be proper for an Oklahoma Court to make the jurisdictional decision for the California Court. There is simply no record offered by the father which would justify any finding of minimum contacts over the mother except the presence of the child, which was accomplished by holding the child in Oklahoma beyond the visitation return date. Even if the father had absolutely no contacts in the State of California, he cannot argue that jurisdic-

tion is proper against the mother when she merely acquiesced in having her child make a visitation to the State of Oklahoma [*Kulko v. Superior Court*, 436 U.S. 84 (1978)], nor did she have a reasonable expectation of being haled into the Oklahoma Court because of her activities in California. *Worldwide Volkswagon v. Woodson*, 444 U.S. 286 (1980).

Furthermore, no adversarial hearing has been conducted for the purpose of determining the truth of the allegations of activities occurring in California, but only upon the issue of whether an emergency existed. Consequently, the cloudy record presented by this case does not present the issue properly developed for review.

CONCLUSION

In conclusion, the respondent urges this Court to consider the incomplete nature of the record below, the lack of a final judgment clearly expressing any Federal issue upon which the State Court may have ruled, and the absence of any compelling Federal policy to be protected by an immediate action of the Court, in reaching a decision to deny the Writ of Certiorari.

Respectfully submitted,

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